

EXHIBIT 2

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1 APPEARANCES, CONTINUED:

2
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5 - and -

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1 THE COURT: Why don't we go on
2 the record, and as we do, I'll just say a few
3 things for the record. The first of which is
4 that we're here this afternoon by way of a
5 protective order dispute teleconference in the
6 matter of VLSI Technology LLC versus Intel
7 Corporation; it's Civil Action Number
8 18-966-CFC-CJB here in our court.

9 Before we go further, let's have
10 counsel for each side identify themselves for
11 the record. We'll start first with counsel on
12 the plaintiff's side, and we'll begin there
13 with Delaware counsel.

14 MR. FARNAN: Good afternoon,
15 Your Honor. Brian Farnan on behalf of the
16 plaintiff, and with me is Michael Harbour,
17 Chris Abernethy, and Ian Washburn, all from
18 Irell & Manella, and Mr. Harbour will argue on
19 behalf of the plaintiff today.

20 THE COURT: Thank you. We'll do
21 the same for counsel on defendants' side;
22 we'll begin with Delaware counsel.

23 MR. BLUMENFELD: Thank you, Your
24 Honor. It's Jack Blumenfeld from Morris

1 Nichols for Intel. Also on are Amanda Major
2 and Liv Herriot from Wilmer Hale and Mashhood
3 Rassam from Intel.

4 THE COURT: And Mr. Blumenfeld,
5 who is going to be speaking for your side?

6 MR. BLUMENFELD: I will. Thank
7 you, Your Honor.

8 THE COURT: All right. Thank
9 you.

10 All right. So the dispute has
11 to do with an issue raised by Intel, and so
12 I'll turn to their counsel first, and
13 Mr. Blumenfeld, it will be you. And I guess
14 I'll let you address what you heard from the
15 other side in their letter first, and then I
16 have a couple of specific questions for you
17 that I'll follow up on.

18 MR. BLUMENFELD: Sure. Thank
19 you, Your Honor.

20 First, just a couple of updates.
21 I know in the letters we said that in the
22 California antitrust case that we had until
23 this Friday, February 5th to file an amended
24 complaint. The parties have since stipulated

1 and Judge Chen has ordered an extension until
2 March 8, so the time pressure has changed a
3 little bit. That's the first thing.

4 The second thing is that there
5 was a similar motion and litigation between
6 the parties in the Western District of Texas.
7 And I'm not terribly familiar with the details
8 of that, but there was I understand a
9 telephone hearing on that this morning, and
10 Judge Albright denied Intel's motion in that
11 case. We think this case is a little
12 different because what we're seeking, the
13 documents we're seeking relief for are
14 different, and also we think the Third Circuit
15 law is a little different, and I will address
16 that in a couple of minutes.

17 Where I'd like to start, Your
18 Honor, is with the provisions of the
19 protective order, because that's something
20 that VLSI didn't address, but they did say in
21 their letter that they relied on the terms of
22 the protective order and accused us of
23 violating the protective order by even
24 bringing this request. And I just wanted to

1 point out a couple of things.

2 One, paragraph 16, 17, and 43 of
3 our protective order, that's DI 96, on access
4 of use all start with the words "unless
5 ordered by the Court." So they clearly permit
6 the Court to order otherwise.

7 And something we didn't cite,
8 but paragraph 65 of that order specifically
9 says that the order is without prejudice to
10 the right of any party to apply to the Court
11 at any time for additional protection or to
12 relax or rescind the restrictions of the
13 order. So I just wanted to get past
14 especially that somehow we violated the
15 Court's order by following the procedure that
16 the order said we should follow.

17 THE COURT: Mr. Blumenfeld, is
18 there anything you want to say relatedly about
19 the suggestion at the end of VLSI's brief that
20 due to Intel's kind of work in the Apple case
21 and the contemplation of or maybe actual
22 preparing of some amended pleading in that
23 case that you violated the protective order
24 because you "used the material any other way"

1 from there?

2 MR. BLUMENFELD: Your Honor,
3 yeah. I don't think there can be any
4 violation when, one, we haven't prepared any
5 amended pleading. We're seeking permission to
6 use documents to do that.

7 Also, when the protective order
8 expressly has a provision permitting us to
9 come to Your Honor or to Judge Connolly and to
10 seek relief from the order, I don't know how
11 else we could do it other than ask you. But
12 we certainly have not disclosed anything to
13 the antitrust lawyers or prepared anything;
14 we're seeking your permission to be able to do
15 that. If we get your permission, we will. If
16 we don't get your permission, we won't. But I
17 don't see how you could use those provisions
18 in any way other than asking the Court. That
19 doesn't mean we've used the information in
20 California or to prepare a pleading. We
21 haven't done either of those things.

22 THE COURT: Okay. Let me let
23 you continue.

24 MR. BLUMENFELD: Just to make

1 clear what we're doing and not doing and what
2 we're trying to do or not trying to do, we're
3 not trying to make anything public. This is
4 not one of those cases like *Pansy* where
5 someone wanted to put things in a newspaper.
6 We're not trying to disclose anything to
7 anyone other than outside counsel in the
8 California case, and outside counsel there is
9 Wilmer Hale; it's the same firm as outside
10 counsel here.

11 What we are trying to do is to
12 use a limited number of documents in the
13 California antitrust action, and I know
14 there's something in their brief that says we
15 haven't said what we want. I think the order
16 that we attached to our motion is exactly what
17 we want. We want to be able to use two
18 documents: The cost to VLSI of acquiring two
19 of the patents-in-suit in this case, the '331
20 and '633 patent; and statements by VLSI's
21 damages expert about the value of the '331
22 patent and VLSI's damages claim. We don't
23 have a similar request for the '633 because
24 there hasn't been any expert discovery there

1 and we don't have those contentions.

2 THE COURT: Mr. Blumenfeld,
3 before you move on, in that regard, in terms
4 of exactly what you want disclosed, I saw the
5 documents attached as exhibits to your letter.
6 It looks like in Exhibits A and B, two
7 agreements; and then Exhibit C, some excerpts
8 from the expert's report as to the '331, I
9 think.

10 I guess the question I had was,
11 are you literally asking to disclose the
12 entirety of that information? It struck me,
13 for example, that it might be the case -- I
14 don't know, maybe this isn't really where the
15 fight is -- that some portion of those docs
16 don't necessarily actually relate to the cost
17 to acquire the patents, or statements about
18 the alleged value or significance of the '331.
19 For example, there's probably some portions of
20 those contracts -- and I guess could say maybe
21 you need the whole thing for completeness.
22 But there's probably some portions of the
23 contracts don't relate to the cost, and
24 there's probably some portion of the excerpt

1 from the expert, like, for example, some of
2 the content on that second page, it may not
3 necessarily go to value.

4 So I wanted to be clear exactly
5 from those docs what were you asking to
6 disclose, the entirety of them or just some
7 substance?

8 MR. BLUMENFELD: Your Honor, we
9 did ask for the entirety, but we don't need
10 the entirety. That's a very good point. What
11 we need are the acquisition costs from the
12 contracts, and I guess that would also have to
13 include what it is that was being acquired,
14 because it wasn't just the one patent. But we
15 certainly would be happy to redact other
16 information out of them.

17 And the same with Exhibit C, to
18 the extent that there is information on the
19 second page that doesn't go to the damages
20 request, we're happy to redact that, too. If
21 Your Honor rules we can use the information,
22 we will be glad to go back and do that and try
23 to work with VLSI's counsel to do that. But I
24 think that's correct, Your Honor, that we

1 don't need the entire agreements.

2 THE COURT: Okay. Let me let
3 you continue.

4 MR. BLUMENFELD: So the issue
5 here I think is largely good cause. And this
6 is an odd situation at least in my experience
7 because we don't disagree that we have to show
8 good cause to modify a protective order. On
9 the other hand, under *Pansy* and other Third
10 Circuit law, the party seeking to maintain
11 confidentiality has the burden to show good
12 cause to keep it confidential, so there's a
13 little bit of a burden on both sides. And I
14 think here, it actually is important because
15 our good cause, in the January 6 order in the
16 Northern District of California, Judge Chen
17 has given us the opportunity to amend our
18 complaint. And the issue is that in his
19 order, he found that our allegations about
20 super competitive prices were not sufficient,
21 and that included a comparison of the prices
22 VLSI paid for the patents compared to what he
23 called the exorbitant damages, I think quoting
24 us, that VLSI has claimed for infringement.

1 And I know we didn't give you,
2 at least I don't think we gave you Judge
3 Chen's opinion, but I'm happy to do that, too.

4 THE COURT: I should say I do
5 have, we were able to find it. We only were
6 able to get the redacted version, though it's
7 lightly redacted, so I have the opinion before
8 me. We could not get the transcript, which I
9 think is not on the docket. But at least for
10 what it's worth, I have the opinion.

11 MR. BLUMENFELD: I'm glad you
12 have it. We should have given it to you. But
13 in footnote 9, I'm sure Your Honor saw that
14 Judge Chen said the plaintiffs did not ask the
15 courts presiding over the VLSI suits against
16 Intel for leave from the protective order so
17 they could make a filing under seal in this
18 case, and that's not what we're trying to do.
19 We get it that we should or could have done it
20 earlier, but we are trying to do it now.

21 And we are seeking very limited
22 information. As Your Honor suggests, we can
23 make it more limited. We do have an interest
24 in getting that limited information to use

1 under seal, not to use publicly in the
2 California action. And we have an interest in
3 those documents, and we'll keep them
4 confidential to outside counsel.

5 But I do want to address
6 specifically Exhibit C to our motion, because
7 as to the '331 damages expert's claim, which
8 is a number and a little bit more, we don't
9 even understand why VLSI's contention is
10 confidential to begin with. I know we've had
11 issues with other judges on this court and
12 with Your Honor where it's been pretty
13 consistently held that contentions that don't
14 reflect that party's confidential information
15 aren't confidential.

16 Now, as to the two agreements,
17 the VLSI acquisition agreements, we don't
18 argue that they're not confidential. But
19 there is balancing, and the issue on the other
20 side is, is there a clearly defined and
21 serious injury alleged with specificity from
22 disclosure to outside counsel in the antitrust
23 case, and we just don't see it.

24 And the Third Circuit law is I

1 think pretty much in our favor on this, which
2 may be different than the law that applied in
3 the Fifth Circuit. But the burden of the
4 party claiming confidentiality to maintain
5 that confidentiality I think is pretty
6 squarely on the party claiming it.

7 And as to the relevance, we
8 think it's relevant, but ultimately that's up
9 to Judge Chen, but we think we've shown good
10 cause, and there's really no serious
11 confidentiality concerns.

12 And unless Your Honor has more
13 questions, that concludes my presentation.

14 THE COURT: Okay. I guess,
15 Mr. Blumenfeld, you don't currently know what
16 rationale Judge Albright used to deny the
17 request earlier today, do you?

18 MR. BLUMENFELD: I do not know.
19 I was not on the call, though I was told that
20 he denied the request, and I really don't know
21 anything more than that.

22 THE COURT: Okay. All right.
23 Thank you. I'll come back to you for brief
24 rebuttal.

1 Let me turn to plaintiff's side.
2 And I can't recall, who is going to speak on
3 behalf of plaintiff's side?

4 MR. HARBOUR: Hi, Your Honor.
5 This is Michael Harbour from Irell & Manella.

6 THE COURT: Hi, Mr. Harbour.
7 I'll give you the chance to respond to what
8 you heard from Mr. Blumenfeld, then I'll jump
9 in with a question or two, as well.

10 MR. HARBOUR: Thank you, Your
11 Honor. I'd like to start with Judge
12 Albright's decision this morning in the
13 Western District of Texas. I was on the call
14 and was able to hear Judge Albright's
15 reasoning. And essentially Judge Albright
16 held that the motion should be denied because
17 this was a specifically negotiated and agreed-
18 upon protective order. VLSI has abided by
19 that protective order.

20 For example, even though we had
21 access based on discovery in these patent
22 cases to Intel's source codes, other
23 discovery, we have not used or intended to use
24 or proposed using that information to file

1 separate infringement claims against Intel in
2 other actions. And I suspect that if we did
3 try to do that, Intel would be up in arms that
4 that was a clear violation of the protective
5 order, specifically the provisions of the
6 protective order that state that the
7 information produced in this case will be used
8 for this case only. That language is sweeping
9 and fairly unequivocal.

10 THE COURT: Mr. Harbour, let me
11 jump in because this goes to one of the points
12 Mr. Blumenfeld made and it was something that
13 I was thinking when I was reading the letters
14 which is, for example, paragraph 43, it
15 certainly says that the part of that paragraph
16 that you quote in your letters, it certainly
17 does say that designated material is only
18 going to be used for purposes of this case and
19 the other ND Cal case that's referenced there,
20 but it starts out by saying "unless otherwise
21 ordered by the Court."

22 So I think as a minimum, one
23 could pretty clearly infer that both sides
24 understood that it's metaphysically impossible

1 for one side or the other to obtain an order
2 in this case that some amount of designated
3 material for some purpose could possibly be
4 used in some other action other than those
5 two. Of course, it has to be ordered by a
6 court or the parties could agree to it, but
7 it's possible, and both sides knew that; they
8 understood it. Maybe the instances would be
9 relatively rare, but it was certainly a
10 possibility. Isn't that fair?

11 MR. HARBOUR: Yes, Your Honor.
12 I think it's fair that the parties anticipated
13 that there might be limited circumstances in
14 which use would be permissible and it can seek
15 court permission for that use. An example of
16 that would be where you have discovery going
17 on in multiple cases that overlap or are
18 related in some way. For efficiency purposes,
19 it's not at all uncommon for there to be minor
20 modification of the protective order that
21 allows cross-use of discovery, so you don't
22 have to go through the rigamarole of
23 requesting the information in the other case
24 and producing it in the other case; the

1 interest of efficiency allows you to have
2 cross-use. And I believe there has even been
3 such provisions in this case.

4 But what Intel is proposing here
5 is categorically different than that. They're
6 not saying that is some need for efficiency
7 where they're going to have discovery obtained
8 in the antitrust action and we might as well,
9 you know, allow cross-use. They're trying to
10 bring a new litigation against VLSI based on
11 this information that they've used in this
12 case, that they obtained in this case, subject
13 to the protective order.

14 It would be analogous if Irell &
15 Manella representing VLSI took information
16 regarding Intel source code and tried to bring
17 an entirely different infringement action
18 against Intel. I think Intel would think that
19 that was completely inaccessible and a
20 violation of the protective order and did not
21 fall into these narrow circumstances where in
22 the interest of efficiency you might modify a
23 protective order to allow cross-use of
24 discovery in a related case.

1 THE COURT: Mr. Harbour, I hear
2 you there, and certainly I can see how it
3 could be a slippery slope. And discovery,
4 particularly sensitive discovery in one case,
5 you know, the parties wouldn't necessarily
6 want it to be used to initiate lots of
7 litigations all around the country for other
8 unrelated matters.

9 I think the question that Intel
10 might point to, I think they are pointing to
11 here, is that, look, doesn't this look a
12 little different here? In this other case,
13 we've got a district court judge who was
14 issuing an opinion and who is basically saying
15 in the opinion, look, this is certain
16 information that it might not have won the
17 day, but it could have at least been relevant,
18 and perhaps might have won the day, who knows.
19 But it was certainly information that if you
20 had it, your motion would be a lot stronger.

21 And he goes on to say, I think,
22 look, you could have asked the other district
23 court for permission to provide it, almost
24 suggesting that such a request makes sense.

1 And if it makes sense and if Intel could have
2 done it and they didn't do it, shame on them,
3 but almost like he's kind of blessing it.

4 And indeed, I think Intel
5 pointed in one of their -- in an attachment to
6 their email that made it appear as if in that
7 case before Judge Chen, VLSI actually faulted
8 Intel and said, hey, Intel, if you thought it
9 was so important, if you think this is really
10 helpful, you could have asked for this; you
11 could have asked the District of Delaware and
12 you didn't do it, so shame on you.

13 So how come I don't read what
14 Judge Chen said in his opinion and what VLSI
15 said in that email as a suggestion that, hey,
16 this was a perfectly appropriate thing for
17 Intel to try to do, they didn't do it the
18 first time and that's their fault, and now
19 Intel is trying to remedy that.

20 MR. HARBOUR: Well, Your Honor,
21 I don't think I read Judge Chen's opinion
22 exactly in that same way. I don't think he
23 was blessing this procedure or saying this was
24 what they should do now that the complaint has

1 been dismissed. And several points on that.

2 First, given the background of
3 the case, Intel came to VLSI and requested use
4 of this information before they filed their
5 amended complaint. Our position was that
6 there was a protective order that prohibited
7 this use, and we're not going to agree to it,
8 and if Intel wanted to seek this relief, it
9 needs to file a request for relief in this
10 court and we can have that dispute adjudicated
11 in the proper way.

12 We weren't saying that the
13 request is proper or that it should be
14 granted. In fact, we wanted the opportunity
15 to be able to brief it and explain why we
16 thought the request was improper.

17 I think likewise, what Intel
18 then tried to do in front of Judge Chen is
19 say, well, VLSI -- they could have just done
20 that at that point; they didn't. Instead,
21 they tried to use the fact that VLSI had
22 refused the request to argue why there should
23 be essentially a lesser pleading standard, a
24 fact, because they didn't have access to the

1 information.

2 Now, what Judge Chen held was
3 two things. I think he, one, said the
4 information doesn't seem to be particularly
5 relevant, because what they're seeking is
6 information about the purchase price of these
7 patents at issue and then what VLSI had sought
8 in damages to show super competitive pricing,
9 or at least alleged super competitive pricing.

10 And what Judge Chen said, this
11 is all of limited probative value, were his
12 exact words, because a damage demand is just
13 that, it's a demand, it's not an actual price,
14 and it hasn't even been adjudicated in this
15 court yet.

16 THE COURT: Mr. Harbour, I was
17 just going to say on the flip side, he didn't
18 seem to say it would be, in and of itself
19 would be the most powerful evidence in the
20 world, but you can read what he's saying as
21 saying, well, is it a piece, is it a piece of
22 the puzzle, is it relevant? Yeah. Now, look,
23 you've got to do some extra work. Just
24 knowing that a demand was made or knowing what

1 the demand was that was made in another case
2 is one thing; making the further case that the
3 differential between that demand and maybe
4 what you paid for the patents is attributable
5 to the aggregation of patent substitutes, it's
6 a different thing, you're going to have to do
7 more work there. But isn't it a fair read
8 that he's saying it's a relevant piece to the
9 puzzle, if not the entire puzzle?

10 MR. HARBOUR: Again, we might
11 have different readings of it, but I
12 appreciate what Your Honor is saying. I think
13 he -- I think he was noting that Intel could
14 have sought this relief; it didn't. But that
15 was in a footnote. His main point was it
16 doesn't seem to solve the -- to get them what
17 they need to state an antitrust claim.

18 But again, I want to address
19 another point, which I think is regardless of
20 whether Judge Chen was saying this information
21 was relevant or not, I don't think he was
22 necessarily condoning what plaintiffs --
23 sorry, what Intel is seeking to do here.

24 And again, I'll just go back to

1 what I think was the basis for Judge
2 Albright's decision this morning. If the shoe
3 were on the other foot and Intel had filed a
4 separate infringement claim not related to the
5 patents at issue here against Intel before
6 Judge Chen, and Judge Chen had dismissed that
7 complaint twice; and then we came to this
8 court and said, you know, we actually want to
9 use Intel's source code that was discovered in
10 this case in order to resurrect that case in
11 which there is no discovery, in fact, in which
12 discovery is stayed, I think Intel would
13 scream bloody murder about that as being a
14 violation of the protective order. And I'm
15 curious what their position is on this call
16 regarding that, but I'd be quite shocked if
17 Intel thought that was permissible.

18 So I guess there's two separate
19 issues. I think it does have to be relevant,
20 and I appreciate that I might have a different
21 read of Judge Chen's opinion than Your Honor
22 does. But I think even if it is relevant,
23 that doesn't mean that this is an appropriate
24 way to replead an antitrust claim , basically

1 trying to use discovery from this case to
2 support a whole new entire action against
3 VLSI.

4 THE COURT: And I guess
5 relatedly, I see the point you're making and
6 the power of it in terms of what if we had
7 tried to do something similar and how would
8 Intel react, and I'll certainly ask Intel for
9 their view on that when I go back to them on
10 rebuttal.

11 But one thing I'm thinking about
12 in terms of the position, though, is I think
13 it's correct that in our circuit, I have to
14 look at the *Pansy* factors here to try to
15 determine what are the relative benefits and
16 harms. In their letter, Intel made the case
17 as to why those various factors came out their
18 way. I didn't really see you in your letter
19 responding as to the substance of those
20 factors and stating your argument into the
21 factors that I have to consider, so I just
22 want to give you a chance to address that.

23 MR. HARBOUR: Thank you, Your
24 Honor. I think that our letter does address

1 the particular factors that we believe are
2 relevant. So one of those factors is if the
3 moving party has to show that they're using
4 the information for a legitimate purpose. And
5 as we noted in our letter, we don't believe
6 that there is a legitimate purpose here,
7 because the purpose that Intel wants to use
8 this for is essentially to resurrect a
9 complaint that has been twice dismissed. And
10 two principles are relevant here.

11 One, under Iqbal, a party is not
12 entitled to discovery in order to basically
13 state a claim. And courts in this
14 jurisdiction and other jurisdictions have held
15 you can't modify a protective order, it's not
16 good cause to modify a protective order in
17 order to circumvent a limitation on discovery
18 in another case. That's one limitation, the
19 basic Iqbal limitation.

20 But in addition, discovery in
21 that case has been stayed pending whether or
22 not Intel can actually state a claim, which
23 they have so far failed to do. So we don't
24 think there's a legitimate purpose here, and

1 that's one of the factors.

2 Another factor is relevance,
3 which we've discussed. Or at least it's a
4 factor that courts will consider in forming
5 that analysis. But another factor is reliance
6 interest. Here I think the reliance interest,
7 for the reasons we've noted, and I think that
8 Judge Albright was convinced of this morning,
9 are quite significant. The parties negotiated
10 the protective order. They both benefitted
11 from that protective order. There are
12 trade-offs in any negotiation about what you
13 can and cannot use.

14 And I know that Intel filed this
15 antitrust complaint well over a year ago. It
16 could have at that point, you know, flagged
17 this issue and said, hey, there might be
18 related issues in the two cases and sought
19 relief in the protective order, and then we
20 could have had a discussion at that point
21 whether or not such relief was appropriate and
22 what its scope would be.

23 They didn't do that. They filed
24 a complaint without mentioning any of this

1 information. They then tried to raise this
2 information without actually seeking relief
3 from the protective order, and now that they
4 have this twice-dismissed complaint are
5 basically trying to use, and after a year and
6 a half of VLSI relying on that protective
7 order to produce information, not anticipating
8 that this information could be used against it
9 in the antitrust case, that is when Intel
10 decides to come forward and seek this relief.
11 So I do think the reliance interests do weigh
12 significantly against modification of the
13 protective order.

14 So those I think are the key
15 relevant factors that we discuss in our
16 motion.

17 Now, one other thing I'd like to
18 note, opposing counsel makes much of the fact
19 that this information will remain confidential
20 and it won't be publicly disclosed. And that
21 can be a relevant factor. But I want to note
22 that it's not the sole purpose of a protective
23 order. Protective orders don't just protect
24 against public disclosure, they also guard

1 against misuse of information produced in
2 litigation.

3 One example that's common in
4 patent infringement cases, including this one,
5 is you have a patent prosecution bar that
6 limits the ability of attorneys who have
7 access to confidential information from filing
8 or prosecuting patents in front of the PTO in
9 related areas. The concern there is not that
10 there's going to be necessarily public
11 disclosure of the information, it's that once
12 that side obtains that information, they could
13 use it to their advantage in another legal
14 proceeding, and parties have interest in
15 preventing that. So I think that factor, as
16 well, weighs against modifying the protective
17 order.

18 THE COURT: Okay. And
19 Mr. Harbour, one last question. I think maybe
20 this is to come back to the issue of what was
21 kind of said in the case before Judge Chen
22 about what Intel could or couldn't do in these
23 other matters with regard to this info. I
24 think the thing I was thinking of is at the

1 end, and this is attached to I think your
2 letter, the email string -- let's see, it's
3 Exhibit B, and it's on the last page.

4 Now, it's admittedly I think
5 Intel's counsel responding to you, to your
6 side, and quoting from what they say is your
7 reply brief on the motion to dismiss in the
8 Northern District of California case, the
9 Fortress case, and they quote you as saying to
10 that court, "If Intel really felt it needed
11 the information [VLSI confidential information
12 from the VLSI v. Intel litigations] to state a
13 claim, Intel should have sought relief from
14 the courts that issued the orders."

15 So is what you're saying, if
16 that's an accurate representation of what was
17 in the reply brief, is what you're saying when
18 you wrote those words, what you meant Judge
19 Chen to understand was, Judge, if Intel really
20 felt it needed the information that we're
21 talking about, it could have sought relief
22 from the other courts. But by the way,
23 there's no chance in the world that those
24 courts would ever grant it because we're going

1 to fight it tooth and nail and it would be
2 absolutely inappropriate for them to seek it
3 or to get it.

4 Doesn't the suggestion to the
5 Court that Intel should have done this at
6 least in some way suggest that it might be not
7 the craziest thing to do, not an outrageous
8 thing to do? What did you mean by those
9 points?

10 MR. HARBOUR: Well, Your Honor,
11 as I noted before, our position, and we've
12 taken this position in front of Judge Chen,
13 including in the hearing on the motion to
14 dismiss, is we've always opposed what Intel is
15 trying to do here. That's why we denied their
16 request to use the information. What we were
17 noting is the proper procedure is not what
18 Intel then did. Intel then filed their
19 amended complaint and said, well, we shouldn't
20 be held to the same pleading standard as the
21 cases cited by VLSI to survive a motion to
22 dismiss, because we asked VLSI for this
23 information and they refused to give it to us.
24 So in responding to that

1 argument, what we said was that makes no
2 sense. If Intel thought it was really
3 important information, they should have sought
4 relief in the protective order. They
5 shouldn't be able to use our refusal to get a
6 lower pleading standard.

7 So our argument was not that
8 would have been proper or this is what they
9 should have done or had they simply went
10 through the right procedural hoops there would
11 be no issue here; we were specifically
12 responding to an argument that they were
13 making about why they should not have to plead
14 sufficient facts to submit a claim. They were
15 trying to essentially shift the blame to us.

16 Now, the reason why we thought
17 that they needed to go through the proper
18 procedure is precisely because we did not
19 think this relief was appropriate, and we
20 noted that to Judge Chen during the motion to
21 dismiss hearing, that we didn't think the
22 information was relevant, and that there was a
23 discovery stay in the antitrust action, and
24 what Intel was trying to do was circumvent

1 that stay after having twice failed to state a
2 complaint.

3 So I'm not suggesting that the
4 quote that opposing counsel provided is
5 inaccurate on its face, but I think it is
6 misleading in that we responded to a
7 particular argument they were making, not
8 suggesting that this would have been proper,
9 and, in fact, what we wanted was an
10 opportunity to brief these issues before this
11 court and Judge Albright and other courts.

12 THE COURT: All right. Thank
13 you, Mr. Harbour. Fair enough.

14 Let me turn back to Mr.
15 Blumenfeld. Mr. Blumenfeld, the first thing
16 I'll ask you is the point that Mr. Harbour
17 made, which I think is a good one, which is,
18 look, you can think of lots of scenarios where
19 a suit is brought here in this case and the
20 defendant says, man, we're going to have to
21 give up some really confidential information,
22 we do not love it, but look, they brought suit
23 against us. But we're going to engage in a
24 protective order, and the protective order,

1 one of the general provisions is you can't use
2 the info in this case to bring other suits in
3 other cases absent a further order of the
4 court.

5 And Intel would get pretty upset
6 if VLSI looked at its source code or its other
7 very confidential docs in this case and
8 thought, you know, I think we could bring a
9 claim against Intel for some separate product
10 that's not even a part of this case, and we
11 only found that out because we got the
12 confidential info in this case. And they
13 suggest that Intel would be up in arms about
14 that. Isn't that right? Wouldn't Intel be up
15 in arms about a scenario like that? And how
16 is what is going on here any different than
17 the scenario Mr. Harbour posited?

18 MR. BLUMENFELD: Yeah, Your
19 Honor, I think it is very different. This is
20 not a situation like getting to use Intel's
21 source code so they could bring a new patent
22 infringement case on other patents. That's
23 not at all what it's like.

24 These patents that we're seeking

1 information about, they're already in play.
2 We're not trying to raise new patents here.
3 They've sued us on these patents; we're
4 litigating them in your court. And the claim
5 is California is already made. It's not to
6 get information to bring a claim, it's to
7 bolster the allegations, and it is to get some
8 facts relating to a claim that's already
9 brought.

10 But I will say, and the other
11 lawyers know this very well, that when we've
12 had issues about cross-use of information
13 between this case and the Western District of
14 Texas, there have been times when they've come
15 to us and said we want to use something that
16 was disclosed under the Delaware protective
17 order in the Texas case, and we've discussed
18 it with them, and in certain instances, we
19 have agreed. So I think this is very
20 different, using information that's already
21 out there in an existing case and saying we
22 want to use your source code in order to bring
23 new patent infringement claims. I think
24 that's just very different.

1 And with respect to the
2 procedures, they made their points about what
3 Judge Chen said about the stay of discovery,
4 and he still included that footnote in his
5 order. So he obviously doesn't view that as a
6 prohibition on seeking relief from this court.
7 Maybe we should have sought it earlier; they
8 suggested we should have sought it earlier.
9 But I don't know how they could suggest that
10 it's wrong for us to seek it from Your Honor.

11 And particularly, I know you
12 cited the "unless otherwise ordered by the
13 Court," but there's also paragraph 65 of the
14 protective order which specifically has a
15 provision saying that any party can seek to
16 modify the protective order, including to
17 relax or rescind provisions.

18 So the notion that somehow they
19 relied on this and when they entered into this
20 protective order, they knew that there was
21 never going to be anything outside the
22 protective order, that's just wrong. It
23 hasn't been the way that this has worked, and
24 it wasn't what anyone contemplated. I mean,

1 the fact is we have litigation between these
2 parties in several courts in the United States
3 now, five that I can think of; we have
4 litigation overseas. And the notion that
5 anyone thought that there would be strict laws
6 and nothing that was ever said in one case
7 could be used in another, I just don't think
8 is realistic or the way it's happened.

9 That's not to say that, yes, we
10 agreed that they can use our source code or
11 would have agreed they could use our source
12 code. That's very different than using two
13 agreements about documents about patent
14 infringement cases that are already existing
15 here and that are alleged to be part of the
16 antitrust case in California.

17 THE COURT: Okay. I guess,
18 Mr. Harbour, if I could just go back to a
19 follow-up question based on what
20 Mr. Blumenfeld said and maybe one other
21 question. The follow-up question, is there
22 anything you want to say? He suggests that in
23 the Western District of Texas case, there have
24 been some instances where VLSI has wanted to

1 use some information that it obtained in this
2 case that, you know, may not be helpful to
3 Intel, and Intel said it was okay. Is there
4 anything you want to say about why what
5 happened there isn't the same as what's
6 happening here?

7 MR. HARBOUR: I think the cases
8 are entirely different in the following sense.
9 In each of the patent cases, the issue is not
10 whether or not VLSI can state a claim. Those
11 cases are in discovery, and the issue is just
12 sort of for efficiency purposes. Should we be
13 able to have cross-use of material, or should
14 the parties have to independently obtain that
15 discovery in each case? And in those
16 instances, it does make sense to have limited
17 modification of the protective order. There's
18 no real dispute that the information is
19 available and can be obtained through
20 discovery, it's just it would just be far more
21 cumbersome to do it in each case individually
22 rather than allow for such process.

23 This is entirely different.
24 Intel has not yet stated an antitrust claim.

1 It is not entitled to discovery in order to do
2 so, both under Iqbal and because that case is
3 currently stayed.

4 So again, I think this is
5 analogous to a case if we had, VLSI had
6 learned through examining Intel's source code
7 on related technology that we could have a
8 better infringement claim in a completely
9 separate case if we could use that source
10 code, Intel, as I just told you, would object
11 to it.

12 And the fact that the antitrust
13 claim was already on file, I don't see why
14 that's relevant. I think, again, if we had
15 filed an infringement claim, a separate one
16 involving different patents and Judge Chen had
17 dismissed it twice and said, hey, I'm just not
18 seeing enough factual detail here, and we came
19 to this court and said, well, now we want to
20 use the source code, again, I think Intel
21 would think it was completely impermissible.
22 And the fact that there's cross-use in cases
23 that are already well into discovery and have
24 overlapping discovery I don't think is

1 analogous at all.

2 The one last point that I would
3 like to make is just --

4 THE COURT: Actually,
5 Mr. Harbour, we don't usually do surrebuttal;
6 I was just asking you to answer the questions
7 I had, and I have a few others. But if it's
8 very brief, I'll let you make it.

9 MR. HARBOUR: No, Your Honor,
10 please go ahead with your questions.

11 THE COURT: Okay. How is your
12 expert's damages number on the '331 patent
13 something that's confidential? I mean, how is
14 that confidential and protected by the
15 protective order?

16 MR. HARBOUR: So Your Honor, I
17 think there are two issues here. One, I did
18 not understand the request to be limited to
19 just that damage demand. What the request
20 specifically called for is statements made by
21 our expert regarding the significance of value
22 of patents. It was much broader than just the
23 damages. It was much broader than just the
24 damage demand.

1 That said, even with respect to
2 the damage demand itself, paragraph 43 is very
3 clear, it's information that either it's
4 produced in this litigation or derived from
5 the designated material produced in this
6 litigation and cannot be used in other cases.
7 And again, I think the issue is not --

8 THE COURT: On that point, I
9 mean, part of the question is, well, I mean,
10 if in this -- I guess -- it certainly is a
11 piece of information that has come up in this
12 case. And so I guess based on that paragraph
13 of the protective order, it falls within the
14 default, it can't be used. But if it is a
15 piece of information that literally if trial
16 were tomorrow, you would stand up and say our
17 expert is going to say we're owed X amount of
18 money in a reasonable royalty, and that was
19 going to be public and anyone could hear it,
20 wouldn't you acknowledge that the case for why
21 there shouldn't be an exception at least as to
22 that demand that's going to be public, is
23 going to come out, is less intense maybe than
24 some of the other information that Intel is

1 trying to obtain?

2 MR. HARBOUR: Well, I do think
3 there are differences of degrees here; I would
4 agree with that. That certain information is
5 more confidential and constitutes a more
6 problematic modification of the protective
7 order.

8 I would have to consider what --
9 you know, again, I think we're not quite at
10 that stage yet where we're at trial and what
11 information is going to be disclosed or what's
12 going to be subject to -- is going to be under
13 seal or not.

14 But again, I think Intel should
15 be at this point held to its bargain, which it
16 agreed it wouldn't use this information. Now,
17 I understand the Court's point that some
18 information, it seems like it may be not as
19 much a concern, and I appreciate that. But I
20 do think that is what the agreement says.

21 THE COURT: Okay. And the other
22 thing I was going to ask is, you know,
23 obviously I have to make my own decision here
24 and will, and Third Circuit law is different

1 than that of other circuits.

2 On the other hand, Judge
3 Albright is a great colleague and someone who
4 I respect, so if he's dealing with a similar
5 issue, it's always nice to see what another
6 judge said about it, whether or not you agree
7 in a particular case. Is there a way you can
8 get me his decision in the Western District of
9 Texas case in the very short term?

10 MR. HARBOUR: I believe so. I'd
11 have to look into that procedurally. There
12 was a transcript; his decision was sort of
13 made on the record. Typically they will issue
14 a decision later today, although it might just
15 be a docket entry. But I don't know what the
16 current status of that transcript is and
17 whether or not it's going to be subject to
18 sealing or what the procedures are in the
19 Western District of Texas. But we will make
20 every effort to touch base with local counsel
21 and see if we can get that to this court as
22 soon as possible.

23 THE COURT: Okay. All right. I
24 mean, I'd like to make a decision relatively

1 soon here. I know that there's a little more
2 wiggle room now, but I'd like to kind of make
3 a decision within the next -- well, but for
4 that, I think I'd make it within the next day.
5 But I can give a little time if it's not too
6 hard to get that before me.

7 So why don't we say this then.
8 I'll ask that to the extent that plaintiff's
9 counsel is able to make available the
10 district's court decision on a related issue
11 in the Western District of Texas to the Court,
12 that they provide it to the Court no later
13 than close of business on Wednesday of this
14 week, if you're able, and then I'll issue a
15 decision on this issue by no later than the
16 end of this week, so that the parties will
17 have my call and they can move forward one way
18 or the other with regard to the California
19 litigation.

20 With that said, then, I'll take
21 the matter under advisement and expect to
22 issue a short order that will resolve the
23 dispute by the end of the day on Friday this
24 week. And to the extent that plaintiffs are

1 able to provide that information by Wednesday,
2 it can go ahead and do so on the docket under
3 seal.

4 If there's nothing further, I
5 appreciate counsel's arguments today and wish
6 everybody health and safety in the weeks
7 ahead. The Court will end its teleconference
8 today. Thank you.

9 (Hearing adjourned at 3:48 p.m.)

1 State of Delaware)
2)
3 New Castle County)

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